

COMMONWEALTH OF PENNSYLVANIA



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July 27, 1998

Office of the Secretary
Federal Communications
Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Telephone Number Portability
Docket No. 95-116

Dear Secretary:

Enclosed please find an original and four copies of the Petition for Reconsideration of the Pennsylvania Office of Consumer Advocate, for filing with the Commission in the above-referenced matter.

Please indicate your receipt of this filing on the additional copy provided and return to the undersigned in the enclosed self-addressed, postage prepaid, envelope. Thank you.

Sincerely yours,

Barrett C. Sheridan
Assistant Consumer Advocate

Enclosure

cc: Penny Rubin, Esq.
J. Bradford Ramsay, Esq.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of : CC Docket No. 95-116
:
Telephone Number Portability : RM 8535

PETITION FOR RECONSIDERATION
BY THE PENNSYLVANIA
OFFICE OF CONSUMER ADVOCATE
OF THE FCC'S THIRD REPORT AND ORDER

Pursuant to Section 1.429 of the Federal Communication Commission's ("FCC" or "Commission") regulations, 47 C.F.R. § 1.429, the Pennsylvania Office of Consumer Advocate ("Pa. OCA") requests that the FCC reconsider and revise its Third Report and Order, as released May 12, 1998. Specifically, the Pa. OCA requests that the FCC revise its Order of May 12, 1998 which permits incumbent local exchange carriers to file tariffs for recovery of carrier-specific costs directly related to the provisioning of long-term number portability through a number portability service charge. *See, Third Report and Order*, FCC 98-92 at B-2 (1998), creating new regulation 47 C.F.R. § 52.33(a). The Pa. OCA contends that the creation of such an end user charge, to be recovered through a federal tariff process, is inconsistent with the express language of Section 251(e)(2) of the Federal Telecommunications Act of 1996 ("Telecom Act"), 47 U.C.S. § 251(e)(2), and is not required to fulfill the legislative intent of Congress.

1. The Pa. Office of Consumer Advocate files this Petition on behalf of Pennsylvania consumers of telecommunications services. The Pa. OCA is authorized to represent the consumers' interest in utility matters at both the state and federal level. 71 P.S. § 309-2. The Pa. OCA's interest in this proceeding is not represented by any other participant.

2. In the FCC's *First Report and Further Notice* in this proceeding, the Commission tentatively determined that there was no ambiguity in the language of Section 251(e)(2) with regard to the distribution of costs related to long-term telephone number portability. Relying on the language of Section 251(e)(2), the Commission stated:

We also tentatively conclude that section 251(e)(2) does not address recovery of those costs [costs related to establishing number portability] from consumers, but only the allocation of such costs among carriers.

First Report and Order, 11 FCC Rcd. 8352, 8460 (1996).

3. However, in the *Third Report and Order*, the FCC determined that the language regarding cost distribution in Section 251(e)(2) is ambiguous. According to the FCC's new view, to assure that the costs are distributed on a competitively neutral basis, Section 251(e)(2) must be read "as applying to both distribution *and recovery*...." of number portability costs. *Third Report and Order*, FCC 98-82 at 24-25 (¶ 39)(emphasis added). In this way, the FCC determined that the legislative intent of Congress required the creation of an end-user surcharge. To fulfill this inferred legislative intent, the FCC has authorized incumbent LECs to file a federal tariff to recover number portability costs from end users. *See*, 47 C.F.R. § 53.22(a).

4. In light of the final regulation as stated in the *Third Report and Order*, the Pa. OCA respectfully submits that the Commission should reconsider its regulation. The Pa. OCA contends

that such a cost recovery mechanism is not consistent with the statutory mandate of Section 251(e)(2) and should not be allowed to take effect in the name of promoting competitive neutrality. Section 251(e)(2) provides the FCC with a limited grant of authority to determine how number allocation costs should be allocated among telecommunications carriers. No broader grant of authority is expressed and none should be inferred by the FCC.

5. The Pa. OCA respectfully disputes the FCC's *Third Report and Order* finding that the language of Section 251(e)(2) is ambiguous. Section 251(e)(2) can and should be implemented according to the plain language meaning of the statutory terms. Section 251(e)(2) states

The cost of establishing ... number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

47 U.S.C. § 251(e)(2). Section 251(e)(2) provides no express authority for the FCC to issue its regulation, 47 C.F.R. § 52.33, which provides for cost recovery of number portability costs from end users. The Pa. OCA submits that there is no basis, either grounded in legislative policy or intent for the FCC to infer such authority which Congress did not grant.

6. The Pa. OCA submits that the Commission should interpret the language of Section 251(e)(2) based on the plain language of this Section. There should be no doubt from reading the language of Section 251(e)(2) that Congress intended that the costs of number portability should be borne by telecommunications carriers. Section 251(e)(2) expressly authorizes the Commission to determine how those costs, which are to be allocated to telecommunications providers, should be allocated on a competitively neutral basis. 47 U.S.C. § 251(e)(2). If the intent of Congress is clear, the FCC must give effect to the unambiguous expression of Congress. *Chevron v. NRDC, Inc.*, 487 U.S. 837, 842-43 (1984). There is nothing in this section which gives the FCC the authority to

determine how telecommunication carriers are to seek recovery of such costs from end users.

7. The FCC only read ambiguity into the statute by analyzing how the costs might be borne on a competitively neutral basis. *Third Report and Order*, FCC 98-82 at 24-25 (¶ 39). The Pa. OCA submits that the FCC erred by not considering the language of Section 251(e)(2) as written. Section 251(e)(2) clearly states that the “costs shall be borne by telecommunications carriers on a competitively neutral basis as determined by the Commission.” 47 U.S.C. § 251(e)(2). The language does not expressly authorize or require the Commission to determine how costs shall be borne by any person or class other than telecommunications carriers. The Pa. OCA submits that Section 251(e)(2) can, as the FCC envisioned in its First Report and Order, and should be interpreted so that the competitive neutrality requirement applies to how costs are borne or allocated among telecommunications carriers and grants no further authority.

8. In Paragraph 4 of the *Third Report and Order*, the FCC suggests that Congress drafted Section 251(e)(2) so as “[t]o prevent the initial cost of providing number portability from itself becoming a barrier to local competition....” *Third Report and Order*, FCC 98-82 at 4 (¶ 4). Even accepting this interpretation of Congressional intent as true, the Pa. OCA respectfully submits that the FCC erred in relying on this policy consideration, to broaden the scope of its regulatory activity to include the issue of cost recovery. The Pa. OCA submits that the better interpretation is that Congress determined that requiring the FCC to allocate costs among telecommunications carriers on a competitively neutral basis was sufficient to promote local competition and that no further action by the Commission was necessary or permitted.

9. The Pa. OCA submits that the FCC’s analysis of the legislative history of the Telecom Act does not support its determination that it has the authority to address both the

distribution and recovery of number portability costs. First, the best evidence of statutory purpose is the language of the statute itself, as adopted by Congress and signed into law by the President. West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98-99 (1991). Second, as the legislative history reviewed by the Commission discloses, Congress did envision ways of drafting specific language which would have expressly addressed the recovery of costs. *Third Report and Order*, FCC 98-82 at 4, fn. 12. Indeed, one House amendment, if approved, would have directed “the Commission to establish regulations requiring full compensation to the LEC for the costs of providing services related to ... number portability.” *Id.*, quoting a House amendment to then section 242(b)(4) of S. 652, S. Conf. Rep. 104-230, at 120-21. Thus, even if the legislative history of the Telecom Act is considered, it is apparent that Congress could have -- but did not -- draft the Act so as to grant the Commission authority to decide matters related to cost recovery by telecommunications carriers of their number portability costs. The Commission should not infer from the Act authority which it could have been, but was not granted.

10. In its *Third Report and Order*, the FCC would “allow but not require incumbent LECs subject to rate-of-return or price cap regulation ...” permission to file a federal tariff to recover through an end user charge their carrier-specific direct number portability costs. *Third Report and Order*, FCC 98-82 at 72 (¶ 135). In support, the Commission determines that such recovery, through an end user charge, “will best serve the goals of the statute.” *Id.* The Commission proposes that such incumbent LECs may recover, if they choose to, their projected costs plus an 11.25% return on unrecovered amounts on a levelized basis over a five year period. *Id.* at 75 (¶¶ 143, 144). For other telecommunications carriers not subject to rate regulation, the FCC directs that such carriers “may recover their carrier-specific costs directly related to providing number portability in any

lawful manner” *Id.* at 72 (¶ 136).

11. The Pa. OCA submits that there is no reason for the FCC to single out incumbent LECs as eligible for this optional, federal rate tariff treatment. Overall, the Telecom Act provides significant benefits and obligations on incumbent LECs. Significantly, Section 251 along with Section 252 and 253, 47 U.S.C. §§ 251, 252, 253, form the roadmap for the opening of local markets to competition, a precondition for the entry by the RBOCs into the long distance marketplace. Arguably, Congress did not provide for federal recovery of number portability costs because guaranteed recovery of every specific cost -- without consideration of other factors -- would be incompatible with the development of a competitive market. The FCC should not disturb the balance of burdens and benefits created by Congress in the Telecom Act by inferring a need to provide for specific cost recovery of number portability costs at the federal level.

12. The fact that incumbent LECs are subject to some form of rate regulation at the state level also does not justify the FCC’s regulation. Just as the Commission envisions that nondominant IXC carriers, competitive LECs and other telecommunications carriers might recover their number portability costs “in any lawful manner,” so the same may be said of incumbent LECs, either through future competitive markets or within the scope of their state regulatory plans. *Third Report and Order*, FCC 98-82 at 72 (¶ 136). The Commission did not find that incumbent LECs had no way to recover their number portability costs except for the optional federal surcharge plan devised in the *Third Report and Order*. Rather, the FCC noted that it had within its control “only two sources from which it may allow carriers to recover costs in the federal jurisdiction: charges IXCs pay LECs for exchange access, and end-user charges.” *Id.* (¶ 135). Apparently, rather than leave the question of cost recovery -- an area over which the FCC has no express authority under

Section 251(e)(2) -- to the states, the FCC opted to exercise control over the recovery of these costs through the creation of an end-user surcharge. The Pa. OCA submits that the FCC exceeded its statutory authority in creating Section 52.33(a), 47 C.F.R. § 52.33(a).

13. The FCC has stated that federal control of the cost recovery of number portability costs will be administratively efficient. In its *Third Report and Order*, the FCC suggested that an exclusively federal recovery mechanism

will minimize the administrative and enforcement difficulties that might arise were jurisdiction over long-term number portability divided.

Third Report and Order, FCC 98-82 at 19-20 (¶ 29). The Pa. OCA submits that the goal of administrative efficiency does not justify the FCC's expansion of its regulation of number portability costs issues to include cost recovery concerns. Regardless of whether the FCC thinks this would be administratively efficient, it is what Congress intended that should control. The FCC should pursue implementation of number portability matters to the degree intended by Congress. *See, Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 749 F.2d 875, 887 (Scalia, J. dissenting) (D.C. Cir. 1984).

14. The Pa. OCA submits that the FCC's administrative efficiency argument is also without sound support as a practical matter. Section 52.33(a) permits recovery of number portability costs only from customers of incumbent LECs in the largest 100 MSAs or served by number-portability capable switches. 47 C.F.R. § 52.33(a)(1)(A). The Pa. OCA submits that some allocation of costs among localities and telecommunication carriers' operating areas would clearly be necessary to implement such an end-user charge. Mere administrative efficiency, which may or may not flow from the purposed surcharge, does not support the FCC's effort to federalize the recovery of number

portability costs.

15. The Pa. OCA submits that while the FCC attempts to match the recovery of number portability costs with the end users who will be enjoying the benefits of competition, the FCC's new regulation could still result in customers, particularly residential customers, being charged for number portability before they enjoy any benefits from it. For example, a switch might be programmed to offer number portability, but if no competitors are serving customers through that switch, then under Section 53.22(a)(1)(A), those customers could be charged by the incumbent LEC but enjoy no benefit from local competition. Similarly, if the switch is programmed for number portability, but the only competitive activity is focused on business customers, then residential customers of the incumbent LEC could nonetheless be charged number portability costs. Even if the FCC was somehow justified in regulating number portability cost recovery matters, the Pa. OCA submits that the FCC's regulation fails to assure that end users, such as residential customers, will indeed be enjoying the benefits of competition when they are charged with the costs. Under the FCC regulation, the only result that some consumers might experience from this provision of the 1996 Act is the imposition of a surcharge for a service that they cannot even use.

16. The Pa. OCA submits that its concerns that the costs of number portability could be felt well in advance of the benefits of local competition are well founded. In Pennsylvania, less than 1 percent of residential customers have experienced competitive choices for local service. While Section 53.22(a) would not permit recovery of the end-user charge until February 1999, after the phase-in dates for long-term number portability in the 100 largest MSAs, the Pa. OCA is concerned that local residential competition will still not be burgeoning to such a degree as to match the benefits with the costs.

WHEREFORE, for the foregoing reasons, the Pennsylvania Office of Consumer Advocate requests that the Federal Communications Commission withdraw Section 52.33(a), 47 U.S.C. § 52.33 and refrain from regulation of number portability cost recovery from end users.

Respectfully submitted,



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